UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Case number: PTA/333/2013

SOFTHOUSE CONSULTING LIMITED **Appellant**

-and-

HER MAJESTY'S COMMISSIONERS OF REVENUE AND CUSTOMS **Respondents**

Tribunal Judge: Colin Bishopp

Sitting in London on 18 February 2014

After perusing the respondents' application for a direction in respect of their costs of and incidental to the appellant's application for permission to appeal, there having been no representations thereon by the appellant,

It is directed that the application is dismissed.

Colin Bishopp
Upper Tribunal Judge

Release date: 19 February 2014

REASONS FOR DIRECTION

1. This application raises an issue of principle. I have decided, therefore, that reasons for my direction should be provided, and that they should be published.

2. The appeal before the First-tier Tribunal was against the refusal of the respondents, HMRC, to give credit for input tax incurred by the applicant, Softhouse Consulting Ltd ("Softhouse"), on the ground that it knew or should have known that its transactions were connected with fraud elsewhere; it was what is commonly referred to as an MTIC appeal. The First-tier Tribunal decided that HMRC were correct, and dismissed the appeal. Softhouse applied unsuccessfully to the First-tier Tribunal for permission to appeal, raising several arguments. All of those arguments were rejected, and permission was accordingly refused. Softhouse then renewed its application to this tribunal, relying on the same grounds. The application was refused, on paper, by Judge Berner.

3. Softhouse exercised its right to an oral hearing, which came before me on 6 January 2014. By this time, the application rested on a single ground, namely that a trader in a "clean" chain cannot be adversely affected by a default in a "dirty" chain, connected to the "clean" chain by a contra-trader, since there is (it was said) an insufficient connection to the fraud to meet the test adumbrated by the Court of Justice of the European Union in *Kittel v Belgium*, *Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537 ("*Kittel*"). In a decision notice released on 9 January 2014 I rejected that argument on the basis that it had no prospect of success, and refused permission.

4. HMRC were represented by counsel at that hearing, in order to oppose the application. It should be remembered that a respondent is provided with a copy of the refusal of permission following consideration of the paper application, and is notified of the hearing of an oral renewal of the application, but is not obliged to attend, and in most cases HMRC, if they are the respondents, do not do so. Thus in this case HMRC made a decision that they should attend, and the question now before me is whether I should direct that Softhouse pay their costs of doing so, including consideration of the paper application, dealing with the oral application and attending the hearing, together with counsel's fees and the cost of a transcript.

5. The first question to be answered is whether the Upper Tribunal has the jurisdiction to make a direction in respect of costs in such circumstances. The starting point is s 29 of the Tribunals, Courts and Enforcement Act 2007, which provides, so far as material to this application, as follows:

> "(1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

6. The relevant rules are the Tribunal Procedure (Upper Tribunal) Rules 2008, but only rule 10 has any application to costs. It provides, again so far as is material, that

> "(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except—
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> …
>
> (a) in proceedings transferred by, or on appeal from, the Tax Chamber of the First-tier Tribunal; …
>
> (4) The Upper Tribunal may make an order for costs (or, in Scotland, expenses) on an application or on its own initiative.
>
> (5) A person making an application for an order for costs or expenses must—
>
> (a) send or deliver a written application to the Upper Tribunal and to the person against whom it is proposed that the order be made; and
>
> (b) send or deliver with the application a schedule of the costs or expenses claimed sufficient to allow summary assessment of such costs or expenses by the Upper Tribunal.
>
> (6) An application for an order for costs or expenses may be made at any time during the proceedings but may not be made later than 1 month after the date on which the Upper Tribunal sends—
>
> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; …
>
> (7) The Upper Tribunal may not make an order for costs or expenses against a person (the 'paying person') without first—
>
> (a) giving that person an opportunity to make representations; and
>
> (b) if the paying person is an individual and the order is to be made under paragraph (3)(a), (b) or (d), considering that person's financial means.
>
> (8) The amount of costs or expenses to be paid under an order under this rule may be ascertained by—
>
> (a) summary assessment by the Upper Tribunal;
>
> (b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses ('the receiving person'); or
>
> (c) assessment of the whole or a specified part of the costs or expenses[, including the costs or expenses of the assessment,]5 incurred by the receiving person, if not agreed.…"

7. HMRC have complied with the formal requirements of the rule, in that the application was made within a month of the release of the decision refusing permission to appeal, was in writing, and was accompanied by a schedule of the

costs claimed. Softhouse has been invited, by its representatives, to make representations, as rule 10(7)(a) requires, but has not done so.

8. HMRC's argument in support of the proposition that there is jurisdiction to make the direction sought is put in this way:

> "… the words 'on appeal from …' in rule 10 should be interpreted to include the application for permission to appeal because this was an application which was necessary, prior to the hearing of any substantive appeal. The application is, on any reasonable interpretation, part of proceedings 'on appeal from' the First-tier Tribunal. The rules must have been intended to include any costs reasonably incurred in responding to such an application, otherwise it would never be possible for the Upper Tribunal to award costs in such circumstances, however large or important the proceedings. The control mechanism is that the costs must have been reasonably incurred in all the circumstances."

9. It is plain from its opening words that rule 10 provides for a costs direction in narrower circumstances than s 29: the power to make a direction in respect of an appeal to the Upper Tribunal from the Tax Chamber of the First-tier Tribunal is granted by way of exception from the general rule that no costs directions shall be made. The question which next presents itself is whether the phrase "proceedings … on appeal from the Tax Chamber" used in rule 10(1)(a) has the same meaning in the context of an application for permission to appeal as "all proceedings in the Upper Tribunal", the phrase used in s 29(1)(b), or means something less. Plainly the latter expression is wide enough to include an application for permission to appeal; but it is not quite so obvious that "proceedings … on appeal" is apt to include proceedings preparatory to an appeal, that is in attempting to secure the permission without which an appeal cannot proceed.

10. On one view, there is no appeal before the Upper Tribunal until one of two events occurs. The first is the lodging with the Upper Tribunal of notice of appeal by an appellant who has been granted permission to appeal by the First-tier Tribunal. The second is when an appellant, refused permission by the First-tier Tribunal, has secured it in the Upper Tribunal; as rule 22(2)(b) indicates, unless there is a direction otherwise, the application for permission stands as the notice of appeal. On this, narrower, view the Upper Tribunal has the jurisdiction to make a costs direction in respect of the entire period from lodging of the notice of appeal in the first case, but only from the grant of permission in the second since, until that moment, there is no appeal and, correspondingly, no "proceedings … on appeal". If that were the correct view there would be no jurisdiction to make a direction in respect of the costs of an application for permission, either to an appellant granted permission who goes on to win the substantive appeal, or to a respondent in respect of an unsuccessful application.

11. That outcome would deprive the ultimately successful appellant of the right to recover a significant part of the costs incurred in vindicating his position. In the case of an appeal categorised in the First-tier Tribunal as Complex, when costs normally follow the event, such an appellant would be able to recover his costs before the First-tier Tribunal (assuming reversal by the Upper Tribunal of an adverse costs direction made by the First-tier Tribunal) and his costs between securing permission and determination of his appeal by the Upper Tribunal. Can it

have been the intention of the Tribunal Procedure Committee, which has responsibility for the rules, that such an appellant must, in all circumstances, bear his own costs of obtaining permission, whether from the First-tier Tribunal or the Upper Tribunal? In my judgment it would be remarkable if that had been the intention. In a full costs-shifting regime the norm would be that the successful party should recover all of the costs reasonably incurred, and one would expect to see an express limitation had the committee thought that some part of those costs should be excluded. In addition, in s 29 one finds the phrase "costs of and incidental to". The phrase is not repeated in rule 10, but there is nothing which suggests that the Committee meant to restrict the scope of the rule to cover "costs of" an appeal, but not "costs of and incidental to" the appeal. Secondary legislation should, of course, be read consistently with the primary legislation pursuant to which it was made (in this case the enabling power is s 22 of the 2007 Act) and in the absence of any limitation on the scope of the costs which may be awarded I am satisfied that the power conferred by rule 10 extends to costs of and incidental to an appeal. In my view the securing of permission to appeal is without question incidental to the appeal itself, and in the case of an appellant a wider interpretation is necessary. Thus a successful appellant should normally be awarded his costs of the application as well as those of the resulting appeal.

12. What, then, of a respondent's position? Suppose, in this case, I had given permission to appeal, following a contested hearing, and Softhouse had gone on, only to lose the substantive appeal. Would it be reasonable to refuse HMRC their costs of resisting the application, when they are ultimately shown to have been correct in the decision from which the proceedings have stemmed? If a successful appellant is entitled, in principle, to all of his costs it seems to me that the same must be true of a successful respondent, and the control mechanism, as HMRC have said, is that costs can be recovered only if they are reasonably incurred. In other words, there is the jurisdiction to make the direction HMRC are seeking, but it should be exercised in favour of a successful respondent, not as a matter of routine, but only when it was reasonable for that respondent to incur costs in resisting an application.

13. There will be many and various factors which determine whether or not costs were incurred reasonably in any particular case, but there are two which, in my judgment, are likely to arise in any case in which a respondent is seeking to recover such costs. The first is that an applicant has only to show that it is arguable that the First-tier Tribunal made an error of law which affected the outcome of the appeal before it. An application for permission is not an occasion for arguing the appeal itself, nor is it an opening for the respondent to seek to stifle an appeal when the applicant is able to show an arguable error of law. The second is that the fact of an oral application necessarily implies that the applicant has already failed twice, on paper applications, to secure permission. A respondent should ordinarily be cautious about incurring costs against that background. In the light of those factors respondents seeking their costs of resisting an application, whether HMRC or taxpayers, will bear the burden of demonstrating that intervention (rather than relying on the experience and expertise of the Upper Tribunal judges) was reasonable; it will not be assumed.

14. There may, of course, be occasions on which, despite exercising all due caution, a respondent concludes that intervention is warranted, and I therefore come to the question whether this is one of those occasions.

15. HMRC's position is that the application for permission to appeal, as originally presented, raised various arguments which, in essence, seek to challenge the decision of the Court of Appeal in *Mobilx Ltd (in administration) v Revenue and Customs Commissioners; Blue Sphere Global Ltd v Revenue and Customs Commissioners; Calltel Telecom Ltd and another v Revenue and Customs Commissioners (No 2)* [2010] STC 1436 ("*Mobilx*"), on the ground that it failed to interpret and apply the judgment in *Kittel* correctly. These are arguments which have been repeatedly rejected not only by the Court of Appeal but also by this tribunal, most recently in *Fonecomp Ltd v HMRC* [2013] UKUT 0599 (TCC) and in *Edgeskill Ltd v HMRC* [2014] UKUT 0038 (TCC). It is, HMRC say, unreasonable that they have been required to litigate the same points in appeal after appeal, when there is ample authority, not only in *Mobilx* but in decisions of this tribunal, that the arguments—in this case about connection to fraud through a contra-trader—have no merit. They go on to say that this was one of a group of appeals raising similar arguments and, I infer, their contention is that it was reasonable to seek to protect the victory they had achieved before the First-tier Tribunal, and avoid the risk that they would need to re-litigate the same points yet again before this tribunal at public expense.

16. I do not doubt that HMRC had a legitimate interest in the outcome of the application but the fact of a legitimate interest does not of itself make it reasonable to incur costs in protecting it; an assessment of the risk is necessary. If, for example, it is plain that an application for permission to appeal is misconceived (and it is true to say that many are), that the grant of permission is unlikely and that, if permission were granted but the appeal failed, the appellant would be able to meet his opponent's costs of defending it one might well conclude that costs incurred in resisting the application would have been unreasonably, because unnecessarily, incurred. At the other extreme, a respondent with serious reason to think that the applicant was attempting to obtain permission by deceit, or by attacking findings of fact on a partial even if not deceitful account of the evidence available to the First-tier Tribunal, would be foolish if he did not resist the application. This case falls between those extremes: the application was not so plainly hopeless that it was certain to fail, there was no reason to think that any form of deceit was to be practised, and there was no attack on the First-tier Tribunal's findings of fact.

17. There is also, I think, a further consideration. Taxpayers seeking to challenge decisions of the First-tier Tribunal before this tribunal already risk an adverse costs direction if they lose (even though they may not have been exposed to costs-shifting in the First-tier Tribunal); the risk of an adverse costs award in the event of an unsuccessful application for permission to appeal may well operate as an additional disincentive to an appellant who, despite having been refused twice, does in fact have a meritorious appeal—and there are several examples of permission being given only on oral renewal of an application, and in some such cases the appellants have gone on to succeed. For that reason, as it seems to me,

the tribunal should lean towards refusing a costs direction in favour of the respondent to an application for permission.

18. Nevertheless, the presumption should not be excessively hard to displace. In the examples I have given of deceit or a partial account of the evidence, an award of costs might be appropriate, and there are no doubt other circumstances in which that would also be the case. However, I have come to the conclusion that an award should not be made in this case.

19. I accept that HMRC have been obliged to defend several appeals in which the essence of the argument advanced was that *Mobilx* was wrongly decided, and that although the argument has been decisively rejected many times applications are still being made for permission to appeal to this tribunal in order to advance it again—this case being only one example of many. But that is not, in my view, a sufficient reason for an award of costs. The question before me, as it is before every judge considering whether or not to grant permission to appeal, was whether Softhouse could demonstrate that it was arguable that the Court of Appeal was wrong to decide *Mobilx* as it did, or there has been later CJEU jurisprudence which indicates a change of position. The fact that HMRC have litigated the same point repeatedly is neither here nor there; the only question is whether the point is arguable. The judges of this tribunal are capable of determining a question of that kind, an issue of pure law, for themselves; and in this case nothing said by counsel for HMRC did, or even could have, assisted me. The relevant case law is well settled and well known.

20. For those reasons I have decided that this is not an appropriate case for an award of costs. HMRC have not discharged the burden of demonstrating that it was reasonable for them to incur the costs of attending the hearing.

Colin Bishopp
Upper Tribunal Judge

Release date: 19 February 2014